United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1496

To be argued by
SHEILA GINSBERG

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

-against-

RICHARD A. JACKSON,
a/k/a "John Harris,"

Defendant-Appellee.

Docket No. 76-1496

BRIEF FOR APPELLEE
RICHARD A. JACKSON

ON APPEAL BY THE GOVERNMENT
FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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QUESTIONS PRESENTED

1. Whether the Government has authority to appeal the denial of a Rule 35 motion, and whether the appeal should be dismissed.

2. Whether imposition of a one-year period of incarceration under §5010(d) of the Youth Corrections Act was a lawful and proper sentence in this case.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal by the Government from an order of the United States District Court for the Southern District of New York (The Honorable Charles L. Brieant) denying the Government's motion pursuant to Rule 35, Fed.R.Crim.P., to correct the sentence imposed on Richard A. Jackson on the ground that it was illegal.

The Legal Aid Society, Federal Defender Services Unit, continues as counsel for Richard Jackson on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Richard a Jackson and Phillip Moore were charged in a two-count indictment[1] with the March 2, 1976, robbery of the Union Dime Savings Bank, in violation of 18 U.S.C. §2113(a) (Count I) and §2113(b) (Count II).

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[1]The indictment is set forth in the appendix to the Government's brief at A.4-5.

A. The Guilty Plea and Sentence

On June 21, 1976, Jackson pleaded guilty to Count I of the indictment (A.16[2]). Jackson admitted that he had participated in the robbery and that the money was obtained from a teller to whom he had handed a holdup demand note (A.15-16). No weapons were used in the robbery.

At the time of the plea, Jackson was 21 years old (A.8). He was an admitted heroin addict and was then undergoing treatment for his addiction at the Queensboro Rehabilitation Center in Queens, New York (A.9).

At the sentencing proceeding, it was revealed that after Jackson had pleaded guilty, he agreed to cooperate with the Government and testify against his co-defendant (A.21, 25). The prosecutor stated that Jackson was "extremely candid" about his own participation in the events, that his proffered testimony would have substantially strengthened the Government's case against Phillip Moore, and that his offer to testify was "extremely instrumental" in bringing about a guilty plea from Moore (A.25).

Defense counsel explained to the court that Mr. Jackson's drug addiction was the reason for his involvement in the robbery and that, from the time of his arrest, Jackson had con-

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[2]Numerals preceded by "A" rerer to pages of the appendix tc the Government's brief.

scientiously sought to overcome his addiction (A.[illegible] 23). Counsel reported that the drug rehabilitation facility had found that Jackson made a satisfactory adjustment to that institution and that he proved himself to be reliable whenever released on furlough from that facility (A.22[illegible]).

Judge Brieant found that Mr. Jackson would benefit from youthful offender treatment, and therefore sentenced him to a one-year period of incarceration pursuant to 18 U.S.C. §5010 (d)[3] (A.27). The judge specifically declined to sentence Jackson pursuant to §5010(b), explaining that to do so would subject Jackson to a sentence of much greater length than the judge thought warranted. This is so, the judge revealed, because parole guildelines, which are keyed to the severety rating of the crime committed, automatically require, in Jackson's case -- bank robbery is a "high penalty" crime -- that he serve between 36 and 45 months in prison (A.26-27).

B. The Government's Rule 35 Motion

Approximately seven weeks after imposition of sentence,[4] the Government moved to correct the sentence on the ground that

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[3]Judge Brieant also directed that Jackson was entitled to earn "good time" credit (A.27) and that, upon successful completion of his term, a certificate expunging his record would be issued. 18 U.S.C. §5021.

[4]Mr. Jackson has been in custody since July 29, 1975, and is currently serving his sentence at the Federal Youth Facility at Morgantown, Pennsylvania.

the judge was without authority to impose a one-year period of incarceration under the Youth Corrections Act (A.32-35). The Government argued that incarceration pursuant to the Act must be at minimum for an indeterminate six-year period. While the predetermined parole guidelines require, the Government concedes, that the "indeterminate" sentence in Mr. Jackson's case will be a minimum of 36 to 45 months in prison, the Government nevertheless contends that a judicially imposed definite sentence violates the statute. The affidavit in support of the Government's motion also reveals that "[b]ecause the Bureau of Prisons shares the view that a less than six years determinate [sic] sentence is not authorized in the Youth Corrections Act," under the present sentence Mr. Jackson would be denied good time credit as well as the possibility of expunging his record pursuant to 18 U.S.C. §5021. The rationale for denying a §5021 certificate is the Parole Commission's requirement that a period of confinement be followed by a minimum two-year period of parole before the certificate can issue (A.34).

In denying the Government's motion, the judge below reiterated his belief that Jackson was an excellent candidate for rehabilitation under the Act:

> In view of his youth, his contrition, his successful efforts toward overcoming his drug habit, and his disadvantaged childhood,[5] and

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[5]The court revealed that "Mr. Jackson was raised by his maternal grandmother in the depressed, inner city 'Brownsville' area of Brooklyn and is a young man of limited education" (A.42).

> the Court's belief that Jackson is capable of being rehabilitated and saved, his case cries out for a form of sentencing whereby he could obtain the benefits of the Youth Corrections Act, including specifically, the opportunity to have his conviction expunged if he rehabilitates himself, all as provided in 18 U.S.C. §5021.
>
> Furthermore, were Jackson twenty-six years old, and all the surrounding circumstances the same, the Court would have imposed an adult sentence upon him significantly shorter than the 36 to 45 months contemplated by the Youth Correction Act guidelines as mentioned.
>
> (A.43-44).

The judge rejected the Government's analysis of the Act for several reasons. Specifically, he found that subsection 5010(d), by its broad terms, empowered the judge to determine the length of the period of incarceration under the Act (A.46). The judge realized that to accept the Government's interpretation would deprive the sentencing judge of the flexibility essential to effective sentencing of juveniles (A.44-45). Further, Judge Brieant noted that there is nothing magically rehabilitative about the indeterminate quality of a sentence; indeed, the judge found that the uncertainty of such a sentence can militate against a person's efforts to "restructure his own relationship with society" (A.44).

Finally, the judge recognized that the application of the Government's view of the statute would result in the absurd situation in which a youthful offender would be precluded from treatment under the Act if he did not qualify for probation under §5010(a), but was still not so serious an offender as to deserve a lengthy period of incarceration under §5010(b).

ARGUMENT

Point I

THE GOVERNMENT IS WITHOUT AUTHORITY TO APPEAL THE DENIAL OF A RULE 35 MOTION, AND THE APPEAL SHOULD BE DISMISSED.

Government appeals in criminal cases are "unusual," "exceptional," and "not favored." Carroll v. United States, 354 U.S. 394, 400 (1957). In fact, explicit statutory authority is essential before the Government can appeal (United States v. Jenkins, 420 U.S. 358, 363 (1975)), and that authority will be strictly construed against the Government's appellate rights. Will v. United States, 389 U.S. 90, 96-97 (1967); Carroll v. United States, supra. Here, there is no such authority. Title 18, U.S.C. §3731, the statute that empowers government appeals, simply does not include an appeal from denial of a Rule 35 motion. Specifically, the statute allows appellate challenge to only dismissals of indictments or informations and to orders suppressing or returning seized property. Clearly, orders denying Rule 35 motions do not come within either category. United States v. Lane, 384 F.2d 935, 938 (9th Cir. 1960).

The Government has wisely declined to petition this Court for a writ of mandamus to compel the district court to correct the claimed illegal sentence. Mandamus will be granted not as a matter of right, but only in the exercise of sound judicial discretion and upon equitable principles. Duncan Townsite Co. v. Lane, 245 U.S. 308, 311-312 (1917); Acker v. Pelt Bryan, 299

F.2d 65 (2d Cir. 1962); United States v. Carter, 370 F.2d 521 (9th Cir. 1959). Indeed, mandamus is not available to enforce the strict letter of the law when to do so would, as here, violate its spirit. Duncan Townsite Co. v. Lane, supra, 245 U.S. at 311-312.

This Court (Kaufman, J.) has held:

> [Mandamus] may be refused for reasons comparable to those which would lead a court of equity, in the exercise of its discretion, to withhold its protection of an undoubted legal right.
>
> Acker v. Pelt Bryan, supra, 299 F.2d at 70.

Similarly,

> [mandamus] issues to remedy a wrong, not to promote one, and will not be granted in aid of those who do not come into court with clean hands.
>
> Turner v. Fisher, 222 U.S. 204, 209 (1911).

Therefore, even if the Government were correct in its assertion that the Youth Offender Act does not allow for definite one-year commitments,[6] mandamus relief should nevertheless be denied because it was the Parole Board's misconduct that required resort to the sentence the Government now claims is illegal.

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[6]But see Point II, infra.

In the court below, the articulated reason for the sentence imposed was that it was to compensate for and evade the operation of the parole guidelines, which Judge Brieant characterized as "excessive, unjust, unfair, and unnecessary in [Jackson's] case" (A.45). Specifically, the judge was referring to the Commission's use of guidelines keyed to the severity of the offense committed rather than to the nature and character of the particular defendant. As such, the guidelines conflict with the purpose of the Youth Corrections Act, which is to rehabilitate through individualized treatment of each offender. Dorszynski v. United States, 418 U.S. 424, 434 (1974):

> [T]he execution of the sentence was to fit the person, not the crime for which he was convicted.

Moreover, the parole guidelines, which are in their own way a definite sentence, undermine the benefits the Government claims for indefinite sentences. Indeed, guidelines are less flexible than the definite sentence imposed by the judge; at least the judge, in imposing sentence, has considered the history and character of the individual offender.

In United States v. Cruz, Doc. No. 76-1337, slip op. 503, 505-506 (2d Cir., November 10, 1976), this Court recognized that the Parole Commission's resort to its release guidelines is inconsistent with the intent of the Youth Corrections Act. Cruz was not the first time the courts had sharply criticized guidelines and release procedures of the Commission. United States v. Torun, 537 F.2d 661, 664 (2d Cir. 1976); Snyder v.

United States Board of Parole, 383 F.Supp. 1153 (D. Co,o. 1974); United States v. Norcome, 375 F.Supp. 270, 274 n.3 (D.D.C. 1974); see also United States v. Sluesky, 514 F.2d 1222, 1227-1230 (2d Cir. 1975).

Therefore, whatever the merits of the Government's argument on the availability of a definite sentence under the Youth Corrections Act, the Parole Board's conduct in administering the Act should preclude relief by way of mandamus. The Government having no statutory right to appeal the denial of its Rule 35 motion, the appeal should be dismissed.

Point II

IMPOSITION OF A ONE-YEAR PERIOD OF INCARCERATION UNDER §5010(d) OF THE YOUTH CORRECTIONS ACT WAS A LAWFUL AND PROPER SENTENCE IN THIS CASE.

The Government challenges the decision below on the ground that the trial judge did not have authority to impose a definite one-year prison term under the Youth Corrections Act. The Government reads the statute to require that if any incarceration is imposed under the Act, the minimum period must be an "indeterminate" six-year sentence under §5010(b). The court below considered this argument and properly rejected it.

Judge Brieant found, based on his personal observations of Mr. Jackson and the facts revealed both in the presentence report and by counsel, that while Mr. Jackson should be sentenced under the Youth Corrections Act, the period of incarceration imposed on him should not exceed one year. Aware of the fact that an "indeterminate" sentence under §5010(b) of the Act would automatically mean, in Mr. Jackson's case, 36 to 45 months in prison, the judge found that Jackson would not benefit from a lengthy period of incarceration under §5010(b), and so imposed a one-year term pursuant to §5010(d) of the Act. The sentence was perfectly valid.

Subsection (d) provides:

> If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any

other applicable penalty provision.

Clearly, the language of this provision is sufficiently broad to permit the judge to invoke the benefits of the Act for a deserving youth offender who the judge believes should not be incarcerated for more than a year. This interpretation of the Act comports with the flexibility and discretion in sentencing that has traditionally belonged to the trial judge alone. United States v. Tucker, 404 U.S. 443, 446-447 (1972); Gore v. United States, 357 U.S. 386, [illegible] (1958). In Dorszynski v. United States, supra, 418 U.S. at 436-437, the Supreme Court made clear that nothing in the Youth Corrections Act was intended to intrude upon the sentencing function of the judge:

> The views of the sponsors as to the effect of the Act on the sentencing discretion of the trial courts are thus of particular importance, and they uniformly support the view that the Act was intended to preserve the unfettered sentencing discretion of federal district judges.
>
> Id., 418 U.S. at 437.

While much of what the Court said in Dorszynski was directed at the trial judge's freedom to sentence a youth as an adult, obviously the same criteria apply once the judge has decided to sentence within the Youth Offender Act. To hold otherwise is to carve out an exception to the universal rule and to create a unique area, contrary to reason, in which the judge is compelled to relinquish his sentencing authority to the Parole Commission. Nothing in the statute suggests that Congress intended by this legislation to make such a sweeping

departure from history; in fact, the contrary appears to be true. Dorszynski v. United States, supra. While the judge, if he chooses, can permit the parole authority to determine the release date of an offender under §5010(b), he cannot be forced to do so. As the court below found, there is nothing magically rehabilitative about an indeterminate sentence. Such sentences may, in some cases, have a salutary effect, but it does not follow that an indeterminate sentence is appropriate in all cases in which a youthful offender sentence is appropriate.[7] This is clearly a decision for the trial judge to make. Nothing in the Act explicitly precludes the judicial exercise of this discretion (United States v. Cruz, supra, slip op. at 506), and §5010(d) allows it.[8]

United States v. Cruz, supra, upon which the Government relies for reversal here, held only that a sentence pursuant to §5010(b) could not be restricted to a definite period of years. The sentence in this case was imposed under §5010(d), after a specific finding that Jackson would not benefit from a §5010(b) sentence. Therefore, Cruz is not controlling here.

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[7]In light of the use of parole guidelines, there is an "Alice in Wonderland" quality to the Government's argument that a jail sentence under the Act must be indeterminate. The guidelines are, in their own way, a definite sentence.

[8]Similarly, nothing in the Act precludes the issuance of a §5021 certificate to expunge Jackson's record. Section 5021 requires only that the discharge occur prior to the expiration of the maximum term. A definite term of years does not preclude early release.

Moreover, to the extent that the logic of Cruz applies to a §5010(d) sentence, it is incorrect and should be overruled.[9] If the Youth Corrections Act is to be read to preclude a judge from exercising his discretion to impose a definite sentence within the six-year limitation, the language of §5010(d), which suggests no such limitation, is rendered ambiguous. In that case, the rule of lenity requires that the ambiguity be resolved in favor of the criminal defendant. United States v. Bass, 404 U.S. 336 (1971); Rewis v. United States, 401 U.S. 808, 812 (1971); Bell v. United States, 349 U.S. 81, 83 (1955). The sentence here is lawful and must be upheld.

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[9] If Cruz is applicable to this case, the panel should en banc this case to determine the validity of Cruz.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed; alternatively, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

January 10, 1977

I certify that a copy of this brief [redacted] has been mailed to the United States Attorney for the Southern District of New York.

Sheila Sternberg